PACIFIC & ORIENT INSURANCE CO BHD v. RASIP HAMSUDI & ORS

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
VARGHESE GEORGE JCA
IDRUS HARUN JCA
[CIVIL APPEAL NO: W-02(NCVC)(A)-1360-08-2015]
21 DECEMBER 2016

INSURANCE: *Motor insurance – Policy – Insurer sought declaratory order to avoid liability under insurance policy at High Court - Pending proceedings in Sessions Court (originating summons-1) – High Court granted declaratory order declaring insurance policy void and unenforceable – Application to quash declaratory order – Whether insurer served cause papers of originating summons-1 in accordance with proviso to s. 96(3) of Road Transport Act 1987 – Whether policy should be declared void and unenforceable – Whether insurer protected under s. 96(3) of Road Transport Act 1987*

A collision occurred between two motorcycles bearing registration nos. WFE 1937 and WET 275. The appellant was the insurer of motorcycle no. WFE 1937 which was registered in the name of the fifth respondent. The first respondent, the rider of motorcycle no. WET 275 sustained severe head injuries. The first respondent through the second and third respondents, commenced an action in the tort of negligence against the fourth respondent (the rider of motorcycle no. WFE 1937) and also against the fifth respondent (as the registered owner of motorcycle no. WFE 1937, the insured party) at the Sessions Court (Sessions Court's proceedings). The appellant subsequently intervened in the Sessions Court's proceedings and was added as a further defendant in the suit. While the Sessions Court's proceedings was still pending in court, the appellant separately commenced proceedings at the High Court *vide* originating summons ('originating summons-1') seeking a declaratory order under s. 96(3) of the Road Transport Act 1987 ('RTA') that the appellant as the insurer of motorcycle no. WFE 1937 was not liable to pay any sum under the insurance policy. The High Court declared that the insurance policy issued to the fifth respondent by the appellant was void and unenforceable. Judgment was then entered in the Sessions Court's proceedings in favour of the first, second and third respondents for damages in the sum of RM6,451,550.89, and costs of RM96,579.35. The first, second and third respondents then filed an originating summons ('originating summons-2') and sought for a declaration to quash the declaratory order which had been obtained by the appellant under s. 96(3) of the RTA. The first, second and third respondents asserted, *inter alia*, that they, had not been served with any cause papers of originating summons-1. The High Court Judge held that the appellant was not entitled to benefit from the declaratory order against the judgment obtained in the Sessions Court. Hence the present appeal. The issues that arose for consideration were (i) whether the first,

second and third respondents had sufficient interest to commence originating summons-2 to negate the effect of the declaratory order obtained by the appellant in originating summons-1; and (ii) whether on a proper interpretation of s. 96(3) of the RTA, in particular the proviso thereto, it was incumbent upon the appellant to give notice to the first, second and third respondents before or within seven days after the commencement of originating summons-1 and, if so, whether this had been complied with by the appellant.

Held (dismissing appeal with costs)
Per Varghese George JCA delivering the judgment of the court:

(1) The interest of the first, second and third respondents was statutorily and expressly recognised by virtue of the terms of the proviso to s. 96(3) of the RTA. Any third party (first, second and third respondents) bringing a claim in court involving a vehicle (the subject of the mandatory third party risk insurance under the RTA) was a recognised party named in the proviso to s. 96(3) as being entitled to be notified by the insurer (the appellant) before or within seven days of the commencement of any proceedings under s. 96(3) to declare the relevant insurance policy to be void and unenforceable. Such notice also required the appellant to specify the grounds that would be relied by the insurer in such an application. On the facts, the appellant had not served the requisite notice on the first, second and third respondents as stipulated in the proviso. Therefore, the declaratory order obtained by the appellant under originating summons-1 was clearly in violation of the provisions of s. 96(3) of the RTA. (paras 20 & 22)

(2) The statutory recognition accorded to the first, second and third respondents to be indemnified by the appellant (the insurer) under s. 96(1) of the RTA on any judgment entered in the former's favour, read together with the aforementioned mandatory requirement under the proviso to s. 96(3) of the RTA (to be served with notice together with grounds relied) without a doubt vested in the first, second and third respondents, sufficient interest to institute their originating summons-2 to nullify the declaratory order obtained by the appellant in originating summons-1. (para 23)

(3) Once judgment had been entered in the Sessions Court's proceeding (unless stayed or overturned), the first, second and third respondents were entitled to immediately enforce the judgment obtained against the insured by any appropriate execution mode levied on the insurer. (para 36)

(4) There was no merits in the submission of the appellant that there was no basis or a need for the first, second and third respondents to bring proceedings pursuant to originating summons-2 to quash the declaratory order obtained by the appellant in originating summons-1. On a plain reading of s. 96(3) of the RTA in its entirety it was clearly incumbent

upon the appellant to give notice of the proceedings under originating summons-1 (together with the grounds relied upon) to the first, second and third respondents and this the appellant had conceded had not been done. It had been clearly shown that the appellant had failed to comply with the requirement expressly stipulated in the proviso to s. 96(3) of the RTA. The appellant remained solely responsible for the serious omission in obtaining the irregular declaratory order in the originating summons-1 proceedings. (paras 38 & 41)

Bahasa Malaysia *Headnotes*

Satu kemalangan berlaku antara dua motosikal dengan nombor pendaftaran WFE 1937 dan WET 275. Perayu adalah syarikat insurans motosikal no. WFE 1937 yang didaftarkan atas nama responden kelima. Responden pertama, penunggang motosikal WET 275 mengalami kecederaan parah di kepala. Responden pertama, melalui responden kedua dan ketiga, memulakan satu tindakan dalam tort kecuaian terhadap responden keempat (penunggang motosikal WFE 1937) dan juga terhadap responden kelima (sebagai pemilik berdaftar motosikal WFE 1937, pihak yang diinsuranskan) di Mahkamah Sesyen ('prosiding Mahkamah Sesyen'). Perayu kemudiannya mencelah dalam prosiding Mahkamah Sesyen dan dijadikan defendan dalam tindakan tersebut. Walaupun prosiding Mahkamah Sesyen belum diselesaikan, perayu secara berasingan telah memulakan prosiding di Mahkamah Tinggi melalui saman pemula ('saman pemula-1') memohon perintah pengisytiharan di bawah s. 96(3) Akta Pengangkutan Jalan 1987 ('RTA') bahawa perayu sebagai penanggung insurans motosikal no. WFE 1937 tidak bertanggungan untuk membayar apa-apa jumlah di bawah polisi insurans tersebut. Mahkamah Tinggi telah mengisytiharkan bahawa polisi insurans yang dikeluarkan kepada responden kelima oleh perayu tidak sah dan tidak boleh dikuatkuasakan. Penghakiman kemudiannya dimasukkan dalam prosiding Mahkamah Sesyen memihak kepada responden pertama, kedua dan ketiga untuk ganti rugi dalam jumlah RM6,451,550.89, dan kos RM96,579.35. Responden pertama, kedua dan ketiga kemudian memfailkan saman pemula ('saman pemula-2') dan memohon untuk perisytiharan bagi membatalkan perintah pengisytiharan yang diperoleh oleh perayu di bawah s. 96(3) RTA. Responden pertama, kedua dan ketiga menegaskan, antara lain, bahawa mereka, tidak pernah diberi kertas-kertas kausa saman pemula-1. Hakim Mahkamah Tinggi memutuskan bahawa perayu tidak berhak mendapat faedah daripada perintah pengisytiharan terhadap penghakiman yang diperoleh di Mahkamah Sesyen. Oleh itu rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan mahkamah adalah (i) sama ada responden pertama, kedua dan ketiga mempunyai kepentingan yang mencukupi untuk memulakan saman pemula-2 untuk membatalkan perintah pengisytiharan yang diperolehi oleh perayu dalam saman pemula-1; dan (ii) sama ada tafsiran sewajar s. 96(3) RTA, khususnya provisonya, mewajibkan perayu memberi notis kepada responden pertama, kedua dan ketiga sebelum atau dalam masa tujuh hari selepas permulaan saman pemula-1 dan, jika demikian, sama ada ini dipatuhi oleh perayu.

Diputuskan (menolak rayuan dengan kos)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Kepentingan responden pertama, kedua dan ketiga diiktiraf secara nyata mengikut undang-undang menurut terma-terma proviso s. 96(3) RTA. Mana-mana pihak ketiga (responden pertama, responden kedua dan ketiga) yang membawa tuntutan ke mahkamah yang melibatkan kenderaan (subjek wajib insurans risiko pihak ketiga di bawah RTA) adalah pihak yang diiktiraf dalam proviso kepada s. 96(3) sebagai berhak diberitahu oleh syarikat insurans (perayu) sebelum atau dalam masa tujuh hari bermulanya apa-apa prosiding di bawah s. 96(3) untuk mengisytiharkan polisi insurans yang berkaitan tidak sah dan tidak boleh dikuatkuasakan. Notis tersebut juga mengkehendaki perayu menyatakan alasan yang akan diguna pakai oleh syarikat insurans dalam permohonan tersebut. Berdasarkan fakta, perayu tidak menyampaikan notis yang diperlukan pada responden pertama, kedua dan ketiga seperti yang ditetapkan dalam proviso. Oleh itu, perintah pengisytiharan yang diperolehi oleh perayu bawah saman pemula-1 jelas melanggar peruntukan s. 96(3) RTA.

(2) Pengiktirafan berkanun diberi kepada responden pertama, kedua dan ketiga untuk ditanggung rugi oleh perayu (syarikat insurans) di bawah s. 96(1) RTA atas mana-mana penghakiman yang dimasukkan memihak kepada responden pertama, kedua dan ketiga, dibaca bersama-sama dengan peruntukan mandatori yang dinyatakan di bawah proviso kepada s. 96(3) RTA (untuk disampaikan notis bersama-sama dengan alasan yang diguna pakai) tanpa ragu-ragu terletak hak pada responden pertama, kedua dan ketiga, kepentingan yang mencukupi untuk memulakan saman pemula-2 untuk membatalkan perintah pengisytiharan yang diperoleh oleh perayu dalam saman pemula-1.

(3) Sebaik sahaja penghakiman dimasukkan dalam prosiding Mahkamah Sesyen (kecuali ditangguhkan atau diakas), responden pertama, kedua dan ketiga berhak menguatkuasakan penghakiman yang diperoleh terhadap pihak yang diinsuranskan oleh mana-mana mod pelaksanaan yang sesuai dikenakan atas syarikat insurans dengan segera.

(4) Tidak ada merit dalam hujahan perayu bahawa tiada keperluan untuk responden pertama, kedua dan ketiga untuk membawa prosiding menurut saman pemula-2 untuk membatalkan perintah pengisytiharan yang diperoleh oleh perayu dalam saman pemula-1. Berdasarkan bacaan biasa s. 96(3) RTA keseluruhannya adalah tanggungjawab perayu untuk memberikan notis mengenai prosiding di bawah saman pemula-1 (bersama-sama dengan alasan yang disandarkan) kepada responden pertama, kedua dan ketiga dan ini perayu mengakui tidak dilakukan. Adalah jelas ditunjukkan bahawa perayu gagal mematuhi kehendak yang diperuntukkan dalam proviso s. 96(3) RTA. Perayu kekal

bertanggungjawab secara sepenuhnya terhadap ketinggalan serius dalam mendapatkan perintah pengisytiharan yang tidak teratur dalam prosiding saman pemula-1.

Case(s) referred to:

Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd [2015] 9 CLJ 821 CA ***(refd)***

Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen [2015] 4 CLJ 54 CA ***(refd)***

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd***

Pacific & Oriental Insurance Co Bhd v. Azhar Azizan; Mohd Asyraf Yusoff (Intervener) [2014] 1 LNS 1097 HC ***(refd)***

Yap Seng Hock v. Southern Finance Bhd [2015] 1 LNS 396 CA ***(refd)***

Legislation referred to:

Road Transport Act 1987, s. 96(1), (2), (3)

Rules of Court 2012, O. 35 r. 1(2)

For the appellant - RK Nathan & Vinod Kamalanathan; M/s Vinod Kamalanathan & Assocs

For the 1st - 3rd respondents - Rajan Ayappan & Mabel Sabastian; M/s Sabastian & Co

For the 4th respondent - In person

For the 5th respondent - In person

[Editor's note: For the High Court judgment, please see Rasip Hamsudi & Ors v. Pacific & Orient Insurance Co Bhd & Ors [2015] 7 CLJ 984 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Varghese George JCA:

[1] The immediate proceedings at the High Court from which this appeal emanated was a saman pemula filed on 6 February 2015 by the first, second and third respondents (saman pemula-2). Saman pemula-2 sought for a declaration to quash a declaratory order which had been obtained under s. 96(3) of the Road Transport Act 1987 (RTA) by the appellant, an insurance company, which declaratory order had the effect of absolving the appellant from any liability under the terms of a third party risk motor insurance policy No. 01-70-13-EV-000949 (Certificate of Insurance No. 017013EV000949) (the insurance policy) issued by the appellant.

[2] There was a history and context to the saman pemula-2 proceedings. A collision was alleged to have occurred between two motorcycles on 1 May 2013 bearing respective registration Nos. WFE 1937 and WET 275. The appellant was the insurer at the material time of the motorcycle No. WFE 1937 which was registered in the name of the fifth respondent.

[3] It was claimed that the first respondent was the rider of the other motorcycle No. WET 275 at the time of the collision and that the first respondent had sustained severe head injury which had left him paralysed neck down as a result of that accident.

[4] On 11 February 2014 the first respondent through his parents, the second and third respondents, commenced an action founded in the tort of negligence against the fourth respondent (the claimed rider of motorcycle No. WFE 1937) and also against the fifth respondent (as the registered owner of motorcycle No. WFE 1937) *vide* Selayang Sessions Court Writ No. A53KJ-38-02/2014 (Selayang Sessions' proceedings).

[5] As the records show, the appellant subsequently intervened in the Selayang Sessions' proceedings and was added as a further defendant in that suit. All the defendants in Selayang Sessions' proceedings were represented by a single firm of solicitors who had been appointed by the appellant.

[6] While the Selayang Sessions' proceedings was still pending in court, the appellant separately commenced proceedings in Kuala Lumpur High Court *vide* Saman Pemula No: 24NCC-391-10/2014 (saman pemula-1) seeking a declaratory order under s. 96(3) of RTA that the appellant as the insurer of motorcycle No. WFE 1937 was not liable to pay any sum under the insurance policy.

[7] The cause papers related to saman pemula-1 were served by the appellant on the fifth respondent (the registered owner of motorcycle No. WFE 1937, the insured party). The fifth respondent did not object to the appellant's application and accordingly the High Court on 1 December 2014 declared that the insurance policy issued to the fifth respondent by the appellant was void and unenforceable (... diisytiharkan batal dan tidak berkuat kuasa).

[8] On 26 January 2015, the court in the Selayang Sessions' proceedings acceded to the application of solicitors on record for all the defendants there (namely for the fourth respondent, the fifth respondent and the appellant) to be discharged from further acting for those defendants in that suit.

[9] On 28 April 2015, judgment was entered in the Selayang Sessions' proceedings in favour of the first, second and third respondents for damages in the total sum of RM6,451,550.89, and costs of RM96,579.35. The order of court extracted thereto state that at that time all the defendants in the Selayang Sessions' proceedings were unrepresented.

[10] Counsel for the first, second and third respondents pointed out to us that prior to the judgment being delivered, the appellant had attempted to have their (insurer's) name (as defendant/intervener) in the Selayang Sessions' proceedings removed but this was not allowed by the court.

[11] Saman pemula-2 (from which this appeal arose) was filed on 6 February 2015 before the judgment in the Selayang Sessions' proceedings was delivered. The first, second and third respondents asserted *inter alia* that they, being known to the appellant to be the plaintiffs in the Selayang Sessions' proceedings, had not been named as parties in saman pemula-1 nor had they been served with any cause papers thereto. These omissions on the part of the appellant, it was stressed, were material as the appellant's basis

for seeking the declaration to negate liability under the insurance policy, revolved also around the appellant's allegations of fraud involving the first and/or the second or third respondents, and others.

Decision In Saman Pemula-2

[12] The decision of the High Court in saman pemula-2 was delivered on 10 July 2015. The learned judge firstly held that the first, second and third respondents had sufficient interest to commence that proceedings. It was noted that the impugned declaratory order obtained in saman pemula-1 by the appellant would have the effect of avoiding the statutory liability that was on the appellant under s. 96(1) of the RTA to satisfy any judgment that may in due course have been secured in the first, second and third respondents' favour in Selayang Sessions' proceedings.

[13] The learned judge also noted that the declaratory order obtained by the appellant *vide* saman pemula-1 was '... before the date the liability was incurred ...', meaning before the judgment in the Selayang Sessions' proceedings was entered. Further, the Selayang Sessions' proceedings had already been commenced and was still pending when the application in saman pemula-1 was sought by the appellant. In that respects, the learned judge's observation was that two crucial prerequisites that had to be satisfied for any order to be issued under s. 96(3) of the RTA, had been met by the appellant.

[14] Nevertheless, the learned judge was of the firm view that the validity of the declaratory order obtained under saman pemula-1 basically turned on an interpretation of the whole of s. 96(3) of the RTA which had to include also the proviso thereto. It was pointed out by the court that the proviso expressly required that "... before or within seven days after commencement ...", in this case of saman pemula-1, a notice had to be given by the appellant to the plaintiffs in the pending proceedings, namely the Selayang Sessions' proceedings that an action to obtain a declaration under s. 96(3) of the RTA had been commenced. In the instant case, it was not in dispute at all that no such notice had been given by the appellant to the first, second and third respondents, as the plaintiffs in the Selayang Sessions' proceedings.

[15] The learned judge went on accordingly to state and held as follows:

> [30] Therefore, whilst the Declaratory Order shall be operative and binding against the 1st and 3rd Defendant, as contracting parties to the Policy and as parties to the High Court Suit, the 1st Defendant cannot disentitle the Plaintiffs of their third party statutory rights found in section 96(1) of the Road Transport Act, 1987, by virtue of the Declaratory Order. The Plaintiffs' statutory rights under section 96(1) of the Road Transport Act, 1987, are fully preserved notwithstanding the Declaratory Order.
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> [31] Wherefore, whilst declining to make the orders sought in prayers (a) and (b) of the Originating Summons to set aside the Declaratory Order, for that is matter entirely between the 1st and 3rd Defendants, I will in the interest of justice make the following declaration, that is,

pursuant to the proviso to section 96(3) of the Road Transport Act, 1987, the 1st Defendant is not entitled to the benefit of the Declaratory Order as against the judgment obtained by the Plaintiffs in the Sessions Court Suit provided that the Plaintiffs shall have complied with the statutory requirements of section 96(1) and (2) of the Road Transport Act, 1987.

(emphasis added)

The Appeal

[16] There were three principal contentions advanced in appeal, as we were able to discern, in the submissions of counsel for the appellant. They were in summary:

(a) That there was no basis or even any necessity in law for the first, second and third respondents to apply for and obtain the declarations as formulated in saman pemula-2. The court ought not to have therefore granted the orders as it did here. The declaratory order obtained by the appellant in saman pemula-1 was a matter purely in respect of the relationship between the appellant (as the insurer) and the fifth respondent (as the insured);

(b) That the rights of the first, second and third respondents to recover on the judgment were in any event protected under s. 96(1) of the RTA, and any complaint on the regularity or validity of declarations obtained under saman pemula-1 ought to be pursued by the first, second and third respondents at the stage of recovery proceedings under that s. 96(1) of the RTA; and

(c) That in any event there was no obligations whatsoever on the appellant to serve the 'cause papers' in saman pemula-1 on the first, second and third respondents.

Our Deliberation And Decision

[17] In our assessment, this appeal turned only on two issues. They were:

(a) whether the first, second and third respondents had sufficient interest to commence saman pemula-2 to seek and negate the effect of the declaratory order obtained by the appellant in saman pemula-1; and

(b) whether on a proper interpretation of s. 96(3) of the RTA, in particular the proviso thereto, it was incumbent upon the appellant to give notice to the first, second and third respondents before or within seven days after commencement of saman pemula-1 and, if so, further whether this had been complied with by the appellant.

[18] Section 96(1), (2) and (3) RTA which were material for our consideration is reproduced below:

96. (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by

a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, **then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment** any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

(2) No sum shall be payable by an insurer under subsection (1):

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings;

(b) in respect of any judgment, so long as execution is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either:

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under subsection (1) **if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable**:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action **unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds** on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

(emphasis added)

[19] At the outset, it needs to be appreciated that the declaratory order sought by the appellant in saman pemula-1 was primarily intended to nullify the insurance policy pursuant to which the appellant was obliged under s. 96(1) to meet and satisfy any judgment that may be secured by the first, second and third respondents (in their capacity as plaintiffs in the Selayang Sessions' proceedings) arising from the alleged accident involving the insured vehicle, motorcycle No. WFE 1937. This definitely, in our view, vested in the first, second and third respondents sufficient interest in the outcome of the saman pemula-1 proceedings taken by the appellant, notwithstanding that the insurance policy was a contract only between the appellant and the fifth respondent.

[20] This interest of the first, second and third respondents was statutorily and expressly recognised by virtue of the terms of the proviso to s. 96(3) of the RTA. Any third party (like in this instance, the first, second and third respondents as plaintiffs) bringing a claim in court involving a vehicle (the subject of the mandatory third party risk insurance under RTA) was a recognised party named in the proviso to s. 96(3) as being entitled to be notified by the insurer (in this case the appellant) before or within seven days of the commencement of any proceedings under s. 96(3) to declare the relevant insurance policy to be void and unenforceable. Such notice, it would also be noticed, required the appellant to specify the grounds that would be relied on by the insurer in such an application.

[21] It was also most significant to note that in the proviso itself it was spelt out that such third party (plaintiffs) if duly given the stipulated notice (with the grounds being relied upon) was entitled as a matter of right (at the sole option of such third party) be made a party to the proceedings brought by the insurer.

[22] On the facts of this case, there was no issue that the appellant had not served the requisite notice on the first, second and third respondents as stipulated in the proviso. The declaratory order obtained by the appellant under saman pemula-1 was clearly in violation of the provisions of s. 96(3) of the RTA. The appellant's omission therefore amounted to not just an infringement of that statutory provisions but had the effect of denying the first, second and third respondents of their right to be made a party and be heard on the matter in saman pemula-1. There was no two ways about this. It was our view that if the relevant cause papers had been served by the appellant, it would have satisfied the two limbs of the requirement, namely, of notice of the saman pemula-1 proceedings and also of the grounds that was being relied upon by the appellant in such an application.

[23] In our view, the statutory recognition accorded to the first, second and third respondents to be indemnified by the appellant (the insurer) under s. 96(1) of the RTA on any judgment entered in the former's favour, read together with the aforementioned mandatory requirement under the proviso to s. 96(3) of the RTA (to be served with notice together with grounds relied)

without a doubt vested in the first, second and third respondents, as plaintiffs in the Selayang Sessions' proceedings, sufficient interest to institute their saman pemula-2 to nullify the declaratory order obtained by the appellant in saman pemula-1.

[24] Before us, learned counsel for the appellant strenuously argued that the learned judge, as well as this court, was bound to apply the decision of the High Court in *Pacific & Oriental Insurance Co Bhd v. Azhar Azizan; Mohd Ashraf Yusoff (Intervener)* [2014] 1 LNS 1097; [2015] 10 MLJ 532 and allow the appeal. In that case relied by counsel there was an attempt by a third-party-intervener to set aside a declaratory order annulling a policy of insurance (that is, an order similar to the one granted under saman pemula-1 to the appellant) and this had been dismissed by the High Court there.

[25] Counsel in particular drew our attention to the fact that an appeal against that High Court decision was subsequently dismissed by the Court of Appeal, and further, an application for leave to appeal had also been refused by the Federal Court in that case. It was contended that in that event the aforesaid High Court decision in *Azhar*'s case (*supra*) had been affirmed by the Federal Court and therefore was a binding authority on all other lower courts based on the principles of *stare decisis*.

[26] With respect, we were of the view that this contention of counsel for the appellant was seriously flawed and did not represent the law. We need only refer to the recent observation on this issue by this court in the decision in *Yap Seng Hock v. Southern Finance Bhd* [2015] 1 LNS 396; [2015] 2 MLJ 675. It was as follows:

> [18] Further, we are of the view that the fact leave was not granted by the Federal Court to review the dismissal of the motion does not mean that the decision of the Court of Appeal had been affirmed. We can do no better than refer to the case of *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of The Sabah Foundation & Ors and another application* [1999] 1 CLJ 325; [1999] 1 MLJ 257 where the Federal Court through the judgment of Edgar Joseph Jr FCJ opined as follows:
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> > Having said that, we hasten to add, in the words of Lord Diplock speaking in the House of Lord in *Modern Engineering v. Gilbert-Ash* [1974] AC 689 at pp. 715-716: '**Refusal of leave to appeal does not imply approval by this House of a judgment sought to be appealed against**. That judgment carries the same authority as any other unappealed judgment of the Court of Appeal - neither more or less'. With this statement of principle we respectively agree. The natural tendency, therefore, to claim that a judgment of the Court of Appeal which has been the subject of an unsuccessful application for leave carries greater authority than one which has gone unchallenged, must be resisted.
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> (emphasis added)

[27] Further, we did not have the benefit of the grounds for the decision of the Court of Appeal; only the order that was extracted as regards the dismissal of the appeal was made available. In any event, this court was not bound by the decision of any other panel of this court, even if a similar issue was before and had been adjudicated by that concurrent panel.

[28] More importantly, the decision of the High Court in *Azhar*'s case *(supra)* was distinguishable. Firstly and significantly, it must be pointed out that the proviso to s. 96(3) of the RTA never featured or was discussed by the High Court in the judgment delivered there. It bears repetition that in the instant appeal the challenge on the validity of the declaratory order obtained *vide* saman pemula-1 was premised on the complaint of the first, second and third respondents that (as plaintiffs in the Selayang Sessions' proceedings) no cause papers or notice of saman pemula-1 had been served on them as stipulated, that is, before or within seven days of commencement of that saman pemula-1.

[29] The focus of the High Court in *Azhar*'s case *(supra)*, as would appear, revolved mainly on the intended third party-intervener's right there to intervene in the same proceedings under which the declaratory order had been issued. The principle decisions of the court in that case could be summarised as the following:

(a) The right to intervene 'at any stage of the proceedings' meant that it was to be applied for at any stage before judgment was entered in the proceedings.

(b) The court had no power to set aside an order made in the same action where the judgment had been regularly obtained and after it has been entered and drawn up.

(c) The intended intervener could not apply to set aside the order pursuant to O. 35 r. 1(2) of Rules of Court 2012 since that entity had a specific remedy provided by s. 96(1) of the RTA to file for recovery action against the insurer.

(d) The insurer had to obtain a declaration under s. 96(3) 'before the date the liability was incurred' and here 'liability' only arose when a judgment was handed down by a court; here the declaration had been obtained before the relevant judgment had been entered.

(e) The intended intervener's legal interest, if any, to intervene only came into existence when a judgment had been entered against the insured.

(f) The declaratory order was obtained before the trial at the Sessions Court was concluded and accordingly there was no obligation on the insurer to serve any cause papers on the intended third-party intervener since the latter had not derived any legal interest against the insurer; the proceedings was merely between the insurer and the insured.

[30] We had serious disagreement with the observations of the High Court in *Azhar*'s case *(supra)* identified as (c), (e) and (f) above when taken in the context of the wording of s. 96(3), including the proviso thereto. It was also not consistent with other decided case authorities pertaining to the right of a third party to recover from the insurer monies ordered under a judgment entered against their insured. A B

[31] As earlier adverted to in this judgment, the natural and plain reading of the proviso required the notice of such proceedings, such as in saman pemula-1 in this case (together with the grounds relied upon), had to be given to "... the person who is the plaintiff in the said proceedings". It must be stressed that reference in the proviso was not to a 'judgment creditor'. Clearly, the use of the term 'plaintiff' meant that parties like the first, second and third respondents in Selayang Sessions' proceedings were to be given notice of that saman pemula-1 proceedings. This was consistent with the opening words of s. 96(3) of the RTA itself, namely "... before the date liability was incurred" that is, meaning before judgment was entered in a pending proceeding brought by a plaintiff against the insured. (See the learned judge in *Azhar's (supra)* itself and *Ahmad Nadzrin Abd Halim & Anor v. Allianz General Insurance Company (M) Bhd* [2015] 9 CLJ 821.) C D

[32] We had also pointed out earlier that the closing words of the proviso to s. 96(3) of the RTA vested a right in law on such plaintiff(s) in a pending action against an insured, if they the plaintiff(s) thought fit to be even made a party to the proceedings seeking the declaratory order under s. 96(3) of the RTA itself. The failure of the party seeking a declaration under s. 96(3) of the RTA to give such requisite notice of that proceedings (together with the grounds being relied upon) to such relevant plaintiff(s) was most definitely a denial of an existent legal interest of the plaintiff(s) recognised by statute. Clearly therefore such interest was not dependent on the plaintiff(s) securing first judgment in their favour in a pending suit against the insured. E F

[33] Accordingly, in our view, the conclusions of the learned judge in *Azhar*'s case *(supra)* that the plaintiff(s) had no legal interest to intervene until a judgment was secured in their favour and/or there was no right to be served any cause papers until conclusion of the trial in the pending suit was clearly made *per incuriam* and in total disregard of the express terms in the relevant s. 96(3) of the RTA. G

[34] Further, the decided authorities were all stacked up against the appellant that no separate recovery proceedings had to be taken against the insurer once a judgment had been obtained by a third party against their insured. There would therefore be no further proceedings where the declaratory order obtained by the insurer could be challenged if it was wrongfully secured in violation of statutory requirements including the proviso to s. 96(3) of the RTA. H I

[35] In *Pacific & Orient Insurance Co Bhd v. Muniamah Muniandy* [2011] 1 CLJ 947, this court had this to say on the issue of recovery against an insurer under the mandatory third-party risk insurance requirements of the RTA:

> [21] Nowhere does s. 96(1) of the Road Transport Act 1987 say that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured. **Therefore, the question of the respondent having to file a recovery proceedings under s. 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all**. In short, the respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s.96(1) to enforce the said judgment against the insurer without having to first file a recovery proceedings against the insurer.
>
> (emphasis added)

(see also *Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen* [2015] 4 CLJ 54).

[36] With respect, we were therefore also of the view that it was rather disingenuous of counsel for the appellant to suggest that the first, second and third respondents would have some other opportunity to challenge the declaratory order obtained by the appellant *vide* saman pemula-1. Once judgment had been entered in the Selayang Sessions' proceeding (unless stayed or overturned), the first, second and third respondents were entitled to immediately enforce the judgment obtained against the insured by any appropriate execution mode levied on the insurer.

[37] It was also pertinent that in this instant appeal, the appellant also continued to remain a defendant on the records when judgment was subsequently entered in the Selayang Sessions' proceedings. Unless the declaratory order improperly obtained by the appellant *vide* saman pemula-1 was nullified there was bound to arise complications in any attempt by the first, second and third respondents to enforce or execute upon the judgment they had secured in their favour on 28 April 2015 in the Selayang Sessions' proceedings.

[38] We therefore found no merits in submissions of the appellant's counsel that there was no basis or a need for the first, second and third respondents to bring proceedings pursuant to saman pemula-2 to quash the declaratory order obtained by the appellant in saman pemula-1. On a plain reading of s. 96(3) of the RTA in its entirety it was clearly incumbent upon the appellant to give notice of the proceedings under saman pemula-1 (together with the grounds relied upon) to the first, second and third respondents and this the appellant had conceded had not been done.

[39] Counsel for the appellant in submissions raised also the issue of a possible conflict arising with respect to a declaration obtained under s. 96(3) of the RTA, when read with what has been construed as strict statutory

liability on the part of the insurer to pay under s. 96(1) of the RTA on a judgment obtained against an insured. We were of the view that this issue did not arise in the circumstances of the application under saman pemula-2 to invalidate the declaratory order obtained by the appellant in saman pemula-1 on the grounds of non-compliance with provisions of s. 96(3) of the RTA by the insurer itself. We therefore did not find it necessary to delve into this rather hypothetical issue postulated by the appellant, within this appeal.

[40] For completeness, we must also record that the appellant's counsel informed the court that the appellant (insurer) had sufficient evidence to show that no collision as alleged, had taken place between motorcycles Nos. WFE 1937 and WET 275 on the material date and the claim against the fourth and fifth respondents had been brought under collusion of those respondents with or under fraudulent circumstances even implicating the second and third respondents. With respect, the issue at hand in saman pemula-2 was merely whether the declaratory order obtained by the appellant in saman pemula-1 was regularly obtained or not in accordance with the provisions of s. 96(3) of the RTA, in particular with due regard to the proviso of that provision.

[41] It had been clearly shown that the appellant had failed to comply with the requirement expressly stipulated in the proviso to s. 96(3) of the RTA. Any other related issues that might have been there (such as alleged collusion, fraudulent claim, *non est factum*) were not properly the subject of the saman pemula-2 proceedings at the High Court or in this appeal from the learned judge's decision thereto. As much as we might sympathise with the appellant for the predicament they find itself in, the appellant remained solely responsible for the serious omission on their part in the matter in obtaining the irregular declaratory order in the saman pemula-1 proceedings. All and any other question that was seemingly existent was definitely outside the purview of the court in the proceedings under appeal.

Conclusion

[42] For the reasons discussed and elaborated by us above, we did not find that the learned judge was in error in arriving at the conclusion and making the orders as reproduced at para. 15 above. It was our unanimous decision that nothing had been established by the appellant before us that warranted our appellate intervention.

[43] Accordingly, we ordered that the appeal be dismissed with costs of RM20,000 against the appellant.